UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.,	)	
Plaintiffs,	)	
v.	)	Docket No. 1:11-cv-99
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD,	)	
Defendants.	)	

PLAINTIFFS' PRE-TRIAL BRIEF

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ARGUMENT

I. THE ATOMIC ENERGY ACT PREEMPTS VERMONT'S EFFORTS TO SHUT DOWN VY FOR REASONS OF NUCLEAR SAFETY

There is no dispute in this case that the Atomic Energy Act ("AEA") preempts state regulation of a nuclear power plant for the purpose of regulating nuclear safety. As the Supreme Court held definitively in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) ("*PG&E*"), "the federal government has occupied *the entire field of nuclear safety concerns.*" *Id.* at 212 (emphasis added). Thus, any state regulation of a nuclear plant "grounded in safety concerns falls squarely within the prohibited field." *Id*. at 213.

The only issue before the Court on Count I, therefore, is whether the State did act out of nuclear safety concerns in enacting and applying Acts 74, 160, and 189. The evidence at trial will show overwhelmingly that it did, in three distinct but interrelated ways, and therefore that its challenged actions are preempted.

First, the evidence will show that the State's actual purpose, clear from legislative text, history and context, was to regulate VY based on perceived concerns about nuclear safety and the supposed risks to Vermonters from possible nuclear accidents—risks that Vermont believed the federal government was not adequately regulating. *Second*, the evidence will show that, to the extent legislators or other officials articulated in text or legislative history any concerns with VY other than nuclear safety, those non-safety reasons were invoked only as a pretext for the preempted safety concerns that were the State's true purpose. *Third*, even if the General

Assembly's non-safety reasons for shutting down VY were not pretextual, the evidence will show that nuclear safety was either a significant or the but-for cause of Vermont's actions, and thus those actions must be found preempted even if the State had some purposes other than safety in mind.

For all these reasons, the AEA preempts Acts 74, 160, and 189 on their face and as applied to deny a certificate of public good ("CPG") to VY for reason of concerns about nuclear safety. It is thus no surprise that the United States itself has taken the position in other litigation that at least Act 74 "is preempted by federal law." Defs.' Post-Trial Br., at 98-99, *Vt. Yankee Nuclear Power Corp. v. United States*, No. 03-2663C (Fed. Cl. May 20, 2010) ("[T]he Vermont legislature … was in fact preempted from asserting jurisdiction either directly or indirectly over nuclear safety issues reserved exclusively to the NRC. . . .") (quotation omitted).

A. The General Assembly Enacted And Enforced Acts 74, 160, And 189 For The Purpose Of Regulating Nuclear Safety

Purpose is the touchstone of AEA preemption analysis under *PG&E*. Vermont enacted and applied the special obstacles to VY's operation embodied in Acts 74, 160, and 189 for the preempted purpose of protecting Vermonters from perceived concerns about nuclear safety that Vermont thought were inadequately regulated by the federal government. This preempted purpose is clear from the legislative text, history, and context of each Act.

1. Legislative Text

The text of the challenged statutes reveals the State's preempted safety purpose insofar as they refer to "public health." For example, Act 160 provides for studies that "shall … identify, collect information on, and provide analysis of … *public health* issues …." Vt. Stat. Ann. tit. 30, § 254(b)(2)(B) (emphasis added); *see id.* § 254(C) (requiring PSB to consider objectives of the studies in acting on a petition for a renewal CPG). "Public health" in this

context plainly refers to nuclear safety. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 81 (1990) (explaining that the NRC "is concerned primarily with public health and safety" and that "[w]ith respect to these matters, no significant role was contemplated for the States").

The State defendants will point to some conclusory language in the preambles of the statutes setting forth purposes other than nuclear safety, and would have this Court look no further than such stated purposes. For example, the preamble to Act 160, although never codified into law, states that Vermont aims to consider the "state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives." Act 160, § 1(a). But a court may not "blindly accept the articulated purpose of an ordinance for preemption purposes." *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999) (finding that a city's recitation of a law enforcement goal did not preclude a finding it had acted for preempted "health" reasons that it had "scrupulously avoid[ed]" mentioning); *abrogated on other grounds by Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538-39 (2001). The reason is obvious: if a State's mere articulation of purported non-preempted purposes were sufficient to avoid preemption, then state legislatures could "nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Gade v. v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992) (quotation omitted). Instead, preemption analysis requires a court to consider "the *purpose* of the ordinance as a whole." *Greater N.Y. Metro. Food Council*, 195 F.3d at 108.

2. Legislative History

The purpose of Acts 74, 160, and 189 "as a whole" must be informed by their legislative history. In other constitutional areas, contemporaneous legislative history is a key source of

evidence in determining whether statutes have been enacted for impermissible purposes. For example, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), held that an apparently race-neutral statute or other governmental decision might still be invalidated for impermissible racial purpose based on "circumstantial and direct evidence of intent," including from "legislative … history," particularly "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 266, 268. Similarly, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court stated that inquiry into whether governmental action has an impermissibly religious purpose looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history." *Id.* at 594; *see also McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005) (establishment clause inquiries must take an objective "account of the traditional external signs that show up in the text, legislative history, and implementation of the statute") (quotation omitted).

The search for impermissible purpose in the AEA preemption context likewise properly looks to legislative history, as *PG&E* itself made clear by relying upon a legislative committee report to determine that, in that case, California had not acted based on preempted nuclear safety grounds. 461 U.S. at 213-14. Numerous other courts considering AEA preemption after *PG&E* also have considered the legislative history of the challenged statute or ordinance to ascertain legislative purpose. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1252 (10th Cir. 2004) (considering statements by legislator who sponsored challenged provision and governor to conclude that the provisions "were enacted for reasons of radiological safety and are therefore preempted"); *Long Island Lighting Co. v. Cnty. of Suffolk*, 628 F. Supp. 654, 665-66 (E.D.N.Y. 1986) (prior efforts by county to assert safety concerns supported inference that

county's current legislation, which did *not* specifically mention safety, was nevertheless safety-motivated). Courts have conducted similar analyses in other preemption contexts. *See, e.g.*, *Greater N.Y. Metro. Council*, 195 F.3d at 108 (finding ordinance preempted because, *inter alia*, "the legislative history … is 'replete' with references to the twin purposes of promoting 'health' and combating the dangers of smoking"); *id.* at 108 n.1 (relying on statements by three individual members of city council); *Auto. Club of New York, Inc. v. Dykstra*, 520 F.3d 210, 215 (2d Cir. 2008) (reviewing legislative history to determine whether towing ordinances were preempted); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 417-19 (D. Vt. 1998) (Sessions, J.) (concluding, based on an "examination of the videotapes and transcripts of Burlington City Council Meeting … and of the Public Records of the City Council, the Ordinance Committee and the City Board of Health regarding the Ordinance," that ordinance was "based on smoking and health"—and thus preempted—even though purpose stated in ordinance's text did not mention health concerns).

The legislative history of the enactment and application of Acts 74, 160, and 189 from 2005 to 2010 is replete with references by legislators in both houses of the General Assembly to the preempted purpose of regulating nuclear safety, as made clear in the excerpts from floor debate and committee hearings provided in Volume I of the accompanying Legislative History Appendix (referred to herein as "LA"). To take but a few examples:

Act 74: Senator Lyons expressed that "[o]ur goal in Natural Resources and Energy was to review and provide the safest possible storage for spent fuel rods while they're in Vermont." LA 32 (Pl. Ex. 124A).

Act 160: A Senator asked if "all of our work get[s] overturned because … it's based on safety? That's all it's going to be based on." LA 46-47 (Pl. Ex. 135A).

Act 189: Senator Cummings observed that, "you know, everyone wants a safety inspection." LA 63 (Pl. Ex. 183E).

S. 289: The Senator from Rutland acknowledged that "safety … [was] certainly in everybody's mind in this room." LA 103-04 (Pl. Ex. 278A) (Feb. 24, 2010, referring to Vermont Senate).[1]

Such nuclear safety concerns on the part of legislators were unsurprising, as they were simply responsive to the single-minded safety focus expressed by their constituents. For example, Arnie Gundersen, later appointed to the Public Oversight Panel, warned of shoulder-launched missiles attacking the dry casks. LA 26 (Pl. Ex. 109A). Later, Senator Cummings wondered if in-ground dry cask storage would be safer because "you couldn't shoot rockets at it or rifles" at it. LA 31-32 (Pl. Ex. 119B). Similarly, Peter Alexander of the New England Coalition spoke of viewing a simulation of a radiation release, LA 21 (Pl. Ex. 82B), and a representative later said she had viewed the simulation and saw the radioactive cloud "covers every little bit of the state." LA 29-30 (Pl. Ex. 114A). Other constituents referenced a plant close to "nuclear disaster" in explaining the need for a safety assessment, LA 56-57 (Pl. Ex. 168D), and Mr. Gundersen conversed with a representative about the plant's turbine blowing up and disabling the safety systems, such that "even if the operators were alive, they couldn't get in to shut it down and essentially, it would have a lobotomy," LA 81-82 (Pl. Ex. 196A).

Underscoring that nuclear safety was their concern, Vermont legislators and witnesses often stated that their reason for acting was that they did not trust the NRC to do enough within

[1] *See also, e.g.*, LA 7 (Pl. Ex. 7B), 8-9 (Pl. Ex. 25E), 10-11 (Pl. Exs. 27E, 27H), 19-20 (Pl. Exs. 70A, 70B), 32-33 (Pl. Ex. 124C), 38-39 (Pl. Ex. 127A), 40 (Pl. Exs. 130A, 130B), 50 (Pl. Ex. 149A), 61 (Pl. Ex. 180B), 62-65 (Pl. Exs. 180G, 180I, 180L, 183A, 183F, 183G, 183I, 183J), 69-70 (Pl. Ex. 186C).

its own exclusive jurisdiction to ensure the nuclear safety of Vermonters. For example, in discussing the bill that became Act 74, Senator White bemoaned that "the NRC has, in my opinion, not been the best friend of the population in this whole issue of nuclear power. So I, as a matter of fact, trust the 180 people up here with their limited knowledge a lot more than I trust the NRC in terms of their ability to act as an advocate for the population." LA 30 (Pl. Ex. 114B); *see also id.* at 33-34 (Pl. Ex. 124F) (Sen. Ayer: "I have no faith in the federal government …."), 38-39 (Pl. Ex. 127A), 56-57 (Pl. Ex. 168D), 61 (Pl. Ex. 180D), 62 (Pl. Ex. 180H), 64 (Pl. Ex. 183H), 68 (Pl. Ex. 185G), 77 (Pl. Ex. 194B).

Such statements cannot be dismissed as merely the views of individual legislators, as the documentary history (*see* Legislative History Appendix Volume II, referred to herein as "II LA") reflects that nuclear safety concerns were the repeated concern of the General Assembly as a body. For example, an early draft of S.124, which ultimately became Act 160, identified "safety issues" as one of the objectives of the public engagement section of the bill. II LA 4. Similarly, S. 269, which ultimately became Act 189, was initially titled "An Act Relating to an Independent *Safety* Assessment of the Vermont Yankee Nuclear Plant," II LA 19 (emphasis added), before it was relabeled "An Act Relating to an Independent Vertical Audit and *Reliability* Assessment of the Vermont Yankee Nuclear Facility" with no other material change, II LA 30 (emphasis added). Another draft of S. 269 addressed "safety margins," "operational safety performance," "safety significant findings," and "safety systems." II LA 9, 12.

3. Legislative Context

In addition to such direct evidence of legislative purpose as text and history, powerful circumstantial evidence of legislative purpose may be derived from the "historical background of the decision," including the "specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," and "[s]ubstantive departures" from prior

law. *Vill. of Arlington Heights*, 429 U.S. at 267; *see also Aguillard*, 482 U.S. at 595 (noting that legislative purpose is informed by "the historical context of the statute, and the specific sequence of events leading to [its] passage") (citation omitted). The sequence of events leading up to Acts 74, 160, and 189, and to the Senate's 2010 CPG denial, as well as those actions' sharp procedural and substantive departures from prior practice, provide additional clear evidence of Vermont's preempted legislative purpose to regulate nuclear safety. By enacting repeated measures that singled out VY for special treatment, the General Assembly made itself the ultimate administrative authority over VY in order to engage in disguised safety regulation that would be difficult to accomplish at the agency level.[2]

Acts 74 and 160: The General Assembly's arrogation from the PSB to itself of decisionmaking authority over issuance of a CPG to VY was designed to make it procedurally easier for Vermont to regulate VY for reasons of nuclear safety. Unlike the General Assembly, which can "tie" safety back to non-safety rationales, *see* LA 71, without justifying them, the PSB exercises the powers of a court, Vt. Stat. Ann. tit. 30, § 9, and is bound by rules of procedure, Vt. PSB R. 2.103, 2.105 (*available at* http://psb.vermont.gov/statutesrulesandguidelines /currentrules), as well as the statutory obligation to make findings of fact and state conclusions of law, Vt. Stat. Ann. tit. 30, § 11; *see also id.* § 12 (PSB decisions may be appealed to the Vermont Supreme Court). Indeed, the General Assembly was well aware that "find[ing] another word for safety," LA 43 (Pl. Ex. 134A), would be unlikely to succeed if pursued at the PSB level. As Senator Cummings explained during a March 2, 2006 Senate Finance Committee hearing on the bill that became Act 160:

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[2] While *PG&E* noted that "a state is not foreclosed from reaching [a] decision through a legislative judgment, applicable to all cases," 461 U.S. at 215, as distinguished from an administrative agency judgment applicable to a specific case, 461 U.S. at 216, here, unlike in *PG&E*, each "legislative judgment" was specific to VY .

> [W]e can sit here and listen to three-headed turtles and sterile sheep and whatever we want to listen to and we can make our own decision. . . . And we can have a much broader range of ability to hear and to, you know, than the Board does. The Board for good reasons has much more constraint. We may need more constraint, but we don't have it.

LA 46-47 (Pl. Ex. 135B). Similarly, DPS Commissioner David O'Brien testified in 2008:

> I like the role of the Public Service Board because that allows it to be deliberative and thorough, but I think that the Public Service Board if they were here would say, "Well, nuclear safety is not our purview and our background." So they're going to be, um, um, um, I guess challenged in that, in that sense and we'd have to figure out a way for them to be able to make these sorts of determinations that this bill talks about.

LA 55 (Pl. Ex. 165A).

S.289: The sequence of events and procedural irregularities culminating in the Vermont Senate's February 2010 vote to deny a CPG to VY underscore the legislators' focus on nuclear safety. After Plaintiffs confirmed a tritium leak in early January 2010, then-Senate President Shumlin rushed a February vote concerning the future of VY based on safety concerns about the leak. Senators explicitly invoked safety concerns during debate on the bill. *See, e.g.*, LA 97 (Pl. Ex. 273C) ("Sen. Geyer: "[P]eople are not comfortable with the way that place is operating. And again, they don't want to sleep with one eye … open waiting for something to happen down there that can't be controlled."). The Senate proceeded to vote down the bill 26 to 4. Vt. Legis. Bill Tracking Sys., S. 289 (2010) (*available at* http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0289&Session=2010).

The Senate cannot have been concerned about "reliability" as opposed to safety in this expedited vote, because it rushed to judgment without awaiting the pending supplemental reliability report that it had requested under Act 189, LA 96 (Pl. Ex. 273A), prompting complaints from the DPS Commissioner and several Senators, *see* LA 96-97 (Pl. Ex. 278B) (DPS Commissioner David O'Brien: "[W]e think that a time-out is the appropriate step, as

opposed to taking the action or taking up this bill that's before you."); LA 104 (Pl. Ex. 278E) (Sen. Scott: "Unfortunately for the people of Vermont, politics came before a responsible process today."). Two months later, the supplemental reliability report concluded that Plaintiffs' response to the tritium leak had been "timely, appropriate, and planned effectively" and reaffirmed the original audit's conclusion that the Plant is reliable and capable of operating for another twenty years. II LA 59 (Pl. Ex. 387). By rushing to political judgment without the benefit of this affirmative report, the Senate departed sharply from the requirement of a full record that would have bound the PSB under the Vermont Administrative Procedure Act. *See* Vt. Stat. Ann. tit. 3, § 809(c) (requirement that "[o]pportunity shall be given all parties to respond and present evidence and argument on all issues involved").[3]

B. The General Assembly Invoked Non-Safety Purposes Only As Pretexts For Preempted Nuclear Safety Concerns

To the extent that Vermont legislators invoked non-safety purposes for shutting down VY, those purposes should be disregarded as transparent pretexts for their true safety concerns. The legislative history makes clear that legislators wished to regulate nuclear safety in response to their and their constituents' repeatedly expressed concerns about radiological risk, but feared that to do so too overtly would trigger preemption. To resolve this dilemma, they deliberately sought, in Senator Cummings' telling words, to "find another word for safety." LA 43 (Pl. Ex. 134A).

Such pretextual recitation of non-safety purposes, however, cannot save the challenged acts from AEA preemption. In other contexts, the Supreme Court has repeatedly held that,

[3] In VY's CPG renewal proceeding (which cannot culminate in a new CPG unless the General Assembly grants authorization under Acts 74 and 160), the PSB has received testimony from two dozen witnesses and held public and technical hearings. PSB Dkt. No. 7440 (*available at* http://www.state.vt.us/psb/document/7440VT_Yankee_Relicensing/VY-Relicensing-main.htm).

where the defendant purports to offer a legitimate purpose for its actions and that purpose is shown to be a pretext or "sham" for an unlawful purpose, *McCreary*, 545 U.S. at 865, the defendant's asserted purpose should be disregarded. For example, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the defendant employer asserted that it had terminated the plaintiff's employment not because of the plaintiff's age, but rather because the plaintiff had supposedly failed to maintain accurate attendance records for other employees that he supervised. *Id.* at 138. The jury was presented with evidence that defendant had made age-related comments toward plaintiff (even if not directly in the context of the defendant's termination decision), and that the plaintiff had in fact maintained accurate attendance records. *Id.* at 138-39. The jury found for the plaintiff, and the Supreme Court held that the evidence was sufficient to support the jury's decision to disregard the defendant's proffered reason as a pretext for discrimination and find that age was the real reason. *Id.* at 153-54. Similarly, in *McCreary*, the Court rejected the defendant counties' attempt to defend their display of the Ten Commandments by surrounding the display with secular documents (including the Declaration of Independence) and asserting that the display was thus "educational" in a secular sense, rather than religious, 545 U.S. at 870-71, concluding that "the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality," *id.* at 873.

Vermont's legislators here too "reach[ed] for any way" to regulate VY for nuclear safety reasons without speaking overtly in "safety" terms. They received explicit instruction on how to do so from State officials. For example, DPS attorney Sarah Hofmann counseled legislators to speak in terms of "reliability," "economics," "aesthetics," or the "environment" rather than "safety," stating that there is usually a way "to tie" safety "back to something in that

economic/environmental" or "aesthetic component." LA 23-24 (Pl. Ex. 101A). In a colloquy on Act 74, a Representative suggested that, even if "someone might have a safety issue in mind" concerning dry cask storage of spent nuclear fuel, they might speak instead about "shield[ing] the physical impact—the visible impact of these casks from the river or something," to which Ms. Hoffman replied, "Certainly talking about aesthetics in terms of berms … would be totally acceptable." LA 16-17 (Pl. Ex. 65A). Ms. Hofmann at other times suggested that "reliability" was a better term than "safety." For example when a legislator asked in hearings about Act 189 whether there was "a path to redress" if "there is a safety issue that clearly the federal government is not paying attention to," Ms. Hofmann advised that "[t]he best thing I can tell you [R]epresentative is that the path is that obviously you are concerned about the reliability of the plant and often times reliability and safety go hand in hand." LA 70 (Pl. Ex. 186C). She proceeded to note that she was "pretty good at tying almost everything to reliability." LA 71 (Pl. Ex. 186F); *see also* II LA 32-34 (Hofmann's "Preemption from 50,000 Feet" memo to legislators).

Others likewise taught legislators how to disguise their safety concern with replacement words. *See, e.g.*, LA 15 (Pl. Ex. 57A) (Richard Cowart: "The problem that we're dealing with here is that a lot of the concerns that citizens have are concerns that you can't address directly the way they want them to be addressed"); LA 42-43 (Pl. Ex. 134A) (Defendant James Volz: "I'm not asking you to make a change, but on the fourth line you mention safety, safety issues and … you know, technically the State is preempted from engaging in those."); LA 59 (Pl. Ex. 175A) (Defendant Volz: "I would just … suggest that you make sure the Bill is properly focused on reliability and economic impacts and not so much on safety"); Ngau Reply Ex. 54[4] (document

[4] Citations in form "[name] Ex. _" refer to the record on the motion for a preliminary injunction.

advising to "[r]emove all references to 'safety' to avoid issue of NRC pre-emption. Look at safety only in terms of effect on reliability and economics.").

Such instruction resulted in an ongoing dilemma for Vermont's legislators: they knew that they were "not supposed to talk about safety" (LA 73-74 (Pl. Ex. 187A)),[5] even though safety was "certainly in everybody's mind in the room" (LA 103-04 (Pl. Ex. 278A)). This tension resulted sometimes in legislators' gaffes in referring inadvertently to "safety" or "health" before quickly scrubbing those words in favor of other words like "reliability,"[6] sometimes in legislators' expressions of frustration or confusion at their inability to speak freely and openly about nuclear safety concerns,[7] and sometimes in legislators' laughter at the semantic contortions they and their advisers engaged in to avoid any errant talk about nuclear safety.[8] Tellingly, in

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[5] *See also, e.g.*, LA 63 (Pl. Ex. 183A) ("we talk about a reliability assessment because safety is not within our purview"); 88-89 (Pl. Ex. 226B) ("I think people in this building have become very sensitized to remembering what they're talking about. They're talking about reliability.").

[6] *See, e.g.*, LA 42-44 (Pl. Ex. 134A) (colloquy between Defendant Volz and Senator Cummings where "safety" and "public health" were used in a draft of the bill, but Senate Finance Committee set out to "find another word for safety"); LA 14-15 (Pl. Ex. 50A) ("Rep. Errecart: Yeah, but we can't say that, anything about safety it can only be about economics and aesthetics. Representative: Well, okay I'm not thinking safety."); LA 86 (Pl. Ex. 213A) ("Representative: I think from my feelings of safety and for my constituents' feelings of safety. DEPUTY Commissioner Smith: Reliability. Representative: Reliability …."); LA 82 (Pl. Ex. 197A) ("Administration is calling it a safety assessment. We're trying to avoid that word."); LA 97 (Pl. Ex. 273C).

[7] *See, e.g.*, LA 104 (Pl. Ex. 278D) (SENATOR: "[T]o add to my frustration, and I know others in the body, we have to be really, really careful about what we talk about because what we have jurisdiction over is reliability."); LA 63-64 (Pl. Ex. 183F) ("Representative: I thought I just heard you say that the department wants a safety inspection and we want it. I mean, are we … saying we're going to forget that we do not have oversight for safety, … or is this an independent reliability inspection. Senator Cummings: No. This, this bill speaks exclusively of reliability. And the governor keeps talking about safety.").

[8] *See, e.g.*, LA 90 (Pl. Ex. 226B) (Ms. Hofmann: "So [the NRC] get[s] on the phone with me and say[s] … [emergency core cooling pumps are] a safety item. … [T]hey say, "How could that be reliability?' And I said, 'Well if you say that those can't run, the plant can't run then,' and you know, they think I'm a little bit caught in my own little wheel but that's basically what I tell them. [Laughing].").

countless hours of legislative discussion, the legislators never engaged in any actual factfinding or debate about the "aesthetics," "economics," or "reliability" of VY, except to commission audits that found VY entirely "reliable." These non-safety grounds accordingly operated solely as pretexts for safety, and should be disregarded as not the General Assembly's actual purposes.[9]

C. Even If The General Assembly Had Multiple Actual Purposes, Its Nuclear Safety Purpose Nonetheless Triggers AEA Preemption

Where protection against radiological hazards is the sole purpose of a state statute, the statute is unquestionably preempted by the AEA. *See, e.g.*, *PG&E*, 461 U.S. at 212-13; *Pennsylvania v. Lockheed Martin Corp.*, 684 F. Supp. 2d 564, 586 (M.D. Pa. 2010) ("[T]he federal government occupies the field of nuclear safety entirely, and this field preemption is all encompassing where th[e] state statute at issue involves nuclear safety. In other words, if a state statute was enacted with the purpose of protecting against radiation hazards … it is preempted") (quotation omitted). The evidence at trial will overwhelmingly demonstrate that Vermont's actual purpose in the challenged actions was solely to regulate nuclear safety and that all the asserted non-safety purposes were tortured efforts at regulating safety by other names.

Even if the Court finds that the State's asserted non-safety purposes were sincere and non-pretextual, however, and thus that the State had multiple actual purposes including but not limited to nuclear safety, the AEA preemption result is the same. The AEA preempts state laws or decisions based even partially on nuclear safety for either or both of two reasons *First*, where purpose is the touchstone of preemption analysis, as it is for AEA preemption under *PG&E*,

[9] Even if the pretextual nature of the asserted non-safety purposes is not dispositive, it is relevant to showing (*see* I.C. *infra*) that Vermont never would have tried to shut down VY based on those non-safety reasons alone. *See, e.g.*, *Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 673-74 (7th Cir. 2009) (same evidence adduced to show that a defendant's proffered purpose is a pretext for an unlawful purpose may also show that, even if the proffered purpose was one of several legitimately held purposes, the defendant would not have taken the same action absent reliance on the unlawful purpose).

government action designed to serve a preempted purpose may not be saved by the articulation of other, non-preempted purposes. *Second*, nuclear safety was not just *a* purpose but rather *the* but-for cause of Vermont's decisions; none of these decisions would have been undertaken for the non-preempted reasons in the absence of nuclear safety concerns. In such circumstances, the presence of an impermissible purpose is always fatal.

1. The AEA Preempts Vermont's Regulation Of VY Even If Based In Part On Nuclear Safety Concerns

Even if the Court finds that the General Assembly had both safety and non-safety purposes in mind, the Court should declare Vermont's actions to shut down VY preempted because even a statute based in part on a nuclear safety purpose is preempted under Supreme Court and Second Circuit precedent. In *Gade*, the Supreme Court held that preemption may not be avoided "if the state legislature articulates a purpose other than (*or in addition to*)" a preempted purpose. *Id.* at 105 (emphasis added). There, the Court held that the Occupational Safety and Health Act preempted Illinois statutes providing for the training, testing, and licensing of hazardous waste site workers because those laws had the preempted purpose of regulating occupational health and safety even if they also had the non-preempted purpose of protecting public safety. *Id.* at 104-08. In other words, the mere existence of a non-preempted purpose alongside a preempted purpose did not save the statutes from preemption.

Even before *Gade*, the Second Circuit held similarly in the AEA context in particular. In *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984), the Circuit interpreted *PG&E* as holding that a State "*could not even consider* the safety aspects" of a nuclear power plant, *id.* at 58 (emphasis added), and proceeded to hold that a lawsuit seeking to halt operations of a nuclear plant was preempted because the complaint "appears, *at least in some respects,* to be motivated by safety concerns," *id.* at 59 (emphasis added). *See also United States v. Kentucky*,

252 F.3d 816, 823 (6th Cir. 2001) (state conditions on amounts of "radioactivity" and "radionuclides" that DOE may place in its landfill were preempted where they were intended "to protect human health *and the environment*") (emphasis added); *Me. Yankee Atomic Power Co. v. Me. Pub. Utils. Comm'n*, 581 A.2d 799, 806 (Me. 1990) (state statute preempted because it invoked "public health" and "safety," *among other purposes*).

It is no answer for the State to assert that it was concerned only about the *consequences* of nuclear safety—such as the loss to Vermonters of lucrative tourism, dairy, or maple syrup revenues in the event of a nuclear accident, or the possibility that a nuclear meltdown would cause electrical power interruptions. A State cannot evade preemption by pointing to non-preempted consequences that inevitably follow from the preempted concern. The Second Circuit rejected just such an attempt in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994). In that case, an advertising company challenged as preempted by federal law the city's ordinance regarding tobacco advertising. *Id.* at 69. It was undisputed as a legal matter that the ordinance would be preempted if "based on smoking and health," *id.* at 72, and the city thus argued that its true purpose was to address "the economic costs related to smoking, and not … smoking and health considerations," *id.* at 73. The Second Circuit rejected the argument, explaining: "It is a truism that almost all matters touching on matters of public concern have an associated economic impact on society. But such economic concern does not displace a local government's primary interest—whether it be public safety, the common good, or in this case public health." *Id.* Just as it was a "truism" in *Vango Media* that public health has an associated economic impact, so too it is a truism that safety problems at a nuclear plant can have an

associated economic impact if the plant's power output is reduced or eliminated or radiation contamination ensues.[10]

2. The AEA Preempts Vermont's Regulation of VY Because Nuclear Safety Was Its But-For Cause

Even if this Court finds that Vermont had multiple actual, non-pretextual purposes and that it is insufficient for preemption that nuclear safety was *one* of them, the Court should still find AEA preemption here, employing the well-established standard of but-for causation routinely used in other contexts where government purpose is key and the government asserts multiple purposes. In such cases, government action is invalidated if the impermissible purpose is the *but-for* cause, or in other words, if the government (as here) would not have taken the same action for the asserted permissible reasons in the absence of the impermissible one (here, safety). *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Vill. of Arlington Heights*, 429 U.S. at 270.

The Supreme Court has prescribed a burden-shifting framework for analysis in such multiple-purpose cases. For example, a plaintiff alleging that state action has a racially discriminatory purpose in violation of the Equal Protection Clause must carry the initial "burden of proving that discriminatory purpose was a motivating factor in the [government's] decision," *Vill. of Arlington Heights*, 429 U.S. at 270, but proof that the government "was motivated in part by a racially discriminatory purpose" then "shift[s] to the [government] the burden of establishing that the same decision would have resulted ***even had the impermissible purpose not been considered***," *id.* at 270 n.21 (emphasis added). An identical burden-shifting framework

[10] Moreover, purported concerns about the adequacy of the VY decommissioning fund and the method of the future decommissioning, are also preempted as safety-related, as evidenced by the NRC's extensive regulation in this area. Similarly, purported concerns about Entergy's proposed corporate restructuring was nothing more than a concern about the adequacy of the decommissioning fund, and so is similarly preempted.

exists in the First Amendment context where a party contends that a state actor retaliated against it because it engaged in protected speech or expressive activity. *See Mt. Healthy*, 429 U.S. at 287 ("[T]he burden was properly placed upon [the plaintiff] to show that his conduct was … a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. [The plaintiff] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment even in the absence of protected conduct.").

This burden-shifting framework is fully applicable in the AEA preemption context here, where government purpose is again the central issue. Under that framework, Plaintiffs will offer at trial overwhelming proof that nuclear safety concerns motivated Vermont's challenged actions at least in part (if not exclusively). Accordingly, the burden at a minimum will shift to Defendants to show that the General Assembly would have enacted the challenged statutes and implemented them to deny VY a renewal CPG ***even if it had not considered nuclear safety concerns.*** *See Skull Valley*, 376 F.3d at 1246 (holding, in AEA preemption context, that "the Utah officials here have failed to offer evidence that the provision … is supported by a non-safety rationale").

Defendants cannot possibly carry that burden, for the evidence at trial will show overwhelmingly that any non-safety purpose Vermont asserts for shutting down VY is factually implausible, and therefore that the State never would have taken similar actions in the absence of forbidden concerns about nuclear safety. *See, e.g., Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."). This is equally

true whether the State's asserted non-safety purpose is "economics," "reliability," "energy diversity," or "untrustworthiness."

Economics. An "economic" rationale for shutting down VY is initially implausible because studies uniformly show that closure of the VY Station will cause wholesale electricity prices to rise. *See, e.g.*, Kee Ex. 18 at 2; Kee Ex. 19 at 1-2. Defendants nonetheless will rely on *PG&E*'s statement that "States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other state concerns." 461 U.S. at 205. But this reserved state authority over the economics of state-regulated ***retail*** utilities has no bearing on VY, which is a merchant ***wholesale*** plant that sells power on the interstate market, not a retail utility regulated by the State. As *PG&E* itself recognized, the states' "traditional responsibility" has always been subject to an "exception" in the case of "the need for and pricing of electrical power ***transmitted in interstate commerce***," over which FERC (not the states) has "broad authority." *Id.* at 205-06 (emphasis added).[11]

[11] Because a retail utility franchise confers "a business opportunity free of competition from any source," it must be "balanced by regulation and the imposition of obligations to the consuming public upon the franchised retailers." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 290 (1997). These obligations to the public include providing "adequate" (*i.e.*, reliable) service to consumers, *Okla. Nat'l Gas Co. v. Oklahoma*, 258 U.S. 234, 237-39 (1922), and exercising prudence in incurring costs that captive retail customers would have to pay, such as the cost of building a new nuclear plant in *PG&E*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989).

States grant no similar franchise to merchant wholesale plants and accordingly have no authority or obligation to regulate the economics of such plants. VY sells power exclusively at wholesale and is free to market its power anywhere in New England pursuant to a market regulated exclusively by FERC, not Vermont's General Assembly or PSB. *See PG&E*, 461 U.S. at 205-06; *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550-51 (1977) (holding that "need for power" could be determined by either a state commission *or* "similar bodies" depending on the type of plant, and observing that FERC's predecessor had determined that question for the VY Station as an interstate wholesaler); *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053, 1063-64, 1066 (9th Cir. 2006) (describing "massive shift in regulatory jurisdiction from the states to FERC"), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008); LA 5 (Pl. Ex. 5E), 25 (Pl. Ex. 105B).

Because Vermont's retail utilities do not own or operate VY, and neither they nor their customers are under any obligation to buy power from the VY Station, state "economic" purposes cannot plausibly justify shutting down VY. Continued operation of the VY Station does not interfere in any way with the ability of retail utilities to make purchases from other power sources. *See, e.g.*, II LA 53. Vermont retail utilities already purchase power from other suppliers like HydroQuebec and New Hampshire's Seabrook nuclear plant. After their current PPAs with VY expire in March 21, 2012, they will be free to substitute any supplier they wish for their former wholesale purchases from VY. If Vermont wishes to require its state-regulated retail utilities to do business with wholesalers other than VY, it may require them to do so. Thus "economics" cannot justify Vermont's efforts to force a shutdown of VY.

Reliability. The record at trial will not contain any evidence suggesting that the goal of reliable electric service for customers is furthered by shutting down VY. VY's reliability as a wholesale plant is not a legitimate issue of state concern, but even if it were, Vermont's own studies, including the audit and supplement commissioned by Vermont's General Assembly through Act 189, have found VY to be "operated and maintained in a reliable manner," II LA 37; *see also* II LA 60; Kee ¶ 66 & Ex. 18 at 2. As DPS's Sarah Hofmann candidly observed, while it may be "difficult" for anti-VY legislators "to say," VY has "been a reliable source of generation." LA 86 (Pl. Ex. 212B).

Moreover, a shutdown of VY would jeopardize the reliability of the power supply in the interstate region. As Governor Douglas recognized in 2009, "Vermont Yankee is responsible for providing power to neighboring states through the regional grid." II LA 45. That observation remains true today. According to a 2011 report by the operator of that regional grid, ISO-NE, "potential thermal overloads and voltage violations … generally (but not always) tend to be more

widespread and severe without Vermont Yankee." Kee Ex. 23 at 3; *see also* Kee ¶¶ 63-69; Kee Ex. 25a at 30 (loss of capacity from VY would result in "overloads of transmission facilities in the Vermont, New Hampshire, and Western/Central Massachusetts Load Zones," and "no other generation in New England would mitigate the overloads"); II LA 50 ("Deficiencies more severe with VY out of service"). Thus, ISO-NE recently refused to allow VY to withdraw from the Forward Capacity Market Auction for 2014-2015. ISO-NE Press Release, *New England Procures the Power System Resources Needed for 2014-2015*, June 27, 2011, at 2, *available at* http://www.iso-ne.com/nwsiss/pr/2011/fca5_filing_release_06272011.pdf.[12]

Energy Diversity. Defendants' "energy diversity" rationale also does not save Vermont's statutory and regulatory scheme from federal preemption. While this rationale was mentioned in Act 74, it was not mentioned in connection with SNF storage but rather in connection of the separate creation of the CEDF; in any event, energy diversity is wholly absent from the record of the General Assembly's post-Act 160 conduct toward VY.

Even if it were appropriate for Defendants to supplement the post-2006 record with a *post hoc* "energy diversity" rationale, however, nothing in the legislative history suggests that shutting down VY is necessary or even relevant to this goal. If the General Assembly or PSB wishes to diversify the sources of electrical supply used by Vermont's retail utilities to supply electricity to Vermont customers, it can simply order those state-regulated retail utilities to purchase power from other sources. Likewise, if the General Assembly or PSB wishes to pursue energy diversity in the form of wind or hydro power, it can direct the retail utilities to commit to

[12] *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009), is not to the contrary. There, the court upheld *the federal authority of ISO-NE and FERC* to regulate capacity "require[d] for reliability." *Id.* at 323. While the court suggested in *dicta* that States retain the right to require retirement of existing generating facilities, *id.* at 481, that *dicta* did not speak to the permissible bases on which a State could so require.

purchasing power from such sources, rather than take a wholesale plant out of operation on the interstate grid. Shutting down VY would be counterproductive to the goal of energy diversity by depriving the State of revenues to tax for the development of new energy sources (as was done when Act 74 created the CEDF).

Other Non-Safety Rationales. Defendants' other non-safety rationales, even if they had been contemporaneously invoked by legislators (they were not), are equally implausible, and lack any support in the actual legislative history. With VY shut down, electricity prices will increase, jobs will be lost, state and local tax revenues will decline, and the environment will suffer from increased emission of greenhouse gases. II LA 40, 54-56, 63. And if Vermont "mistrusts" Plaintiffs as business partners and that "mistrust" is not a mere pretext for safety concerns, *see* LA 102 (Pl. Ex. 277E) (Defendant Shumlin's statement during S.289 debate that he does not "trust" Plaintiffs because they allegedly "misled our regulators or our legislators in describing the underground pipes that didn't exist"), the remedy is simply not to do business with them.

II. THE FEDERAL POWER ACT PREEMPTS ACTS 74, 160, AND 189 AS APPLIED TO REQUIRE THAT PLAINTIFFS ENTER INTO POWER PURCHASE AGREEMENTS WITH VERMONT UTILITIES AT BELOW-MARKET PRICES

While Defendants seek to shut down VY for preempted nuclear safety reasons, the evidence at trial will show that they have also pursued a fallback strategy of offering to accept perceived safety risks if VY provides below-market PPAs to Vermont retail utilities, and have used the threat of CPG denial to coerce Plaintiffs into affording in-state utilities below-market rates. *See* LA 24; LA 13 (Pl. Ex. 43A) ("[W]ere license renewal approved by the [PSB], the[n] [Plaintiffs] would have to demonstrate a significant benefit to the State of Vermont. … And that benefit might include the requirement to provide Vermont a … favorable [PPA]"). As one legislator explained, "if the people of Vermont are not going to benefit from a sufficient amount

of power at a good price or a long enough contract[, then] there's no reason to have this plant operate in our, in our region." LA 52 (Pl. Ex. 155B).

This coercive scheme conflicts with FERC's exclusive authority to regulate the sale of electricity at wholesale under the FPA. The FPA requires that all wholesale electricity rates be "just and reasonable," 16 U.S.C. § 824d(a), and grants FERC "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (emphasis added); *see also* 16 U.S.C. § 824(b)(1). Through the FPA, "Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). A State, moreover, "must … give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

Over the past two decades, FERC has permitted sellers of wholesale electricity to file "market-based" tariffs that, "instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). A market-based tariff, like other tariffs filed with FERC, is subject to the filed rate doctrine and ongoing regulation by FERC. *See, e.g., Tex. Comm. Energy v. TXU Energy, Inc.*, 413 F.3d 503, 510 (5th Cir. 2005) (market-based rates are "'filed' within the meaning of the filed rate doctrine"

given regulators' "oversight over the market").[13] Here, Plaintiffs applied for and received authorization from FERC to sell its power into the ISO-NE interstate market at market-based rates. Compl. ¶ 42; Kolber Ex. 28; Ngau Exs. 21-23. Because the "favorable" rates Vermont seeks to extract would differ from rates arrived at through arms-length negotiations between Plaintiffs and Vermont electric retailers pursuant to the market-based tariff filed with FERC, Vermont's coercive use of the CPG scheme is preempted by the FPA.

III. THE COMMERCE CLAUSE PROHIBITS THE COERCIVE USE OF ACTS 74, 160, AND 189 TO EXTRACT LOWER PRICES FOR VERMONT UTILITIES THAN FOR OUT-OF-STATE UTILITIES

The General Assembly's decision to refuse to renew the VY's CPG because Plaintiffs have not provided sufficiently favorable rates for Vermont retail electric utilities also violates the dormant Commerce Clause. The dormant Commerce Clause is "a restriction on permissible state regulation" that applies "even in the absence of a conflicting federal statute." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). State regulation impermissibly discriminates against interstate commerce where, as here, it accords "differential treatment [to] in-state and out-of-state economic interests that

[13] Under the "filed rate doctrine," state courts and regulatory agencies are preempted from requiring the payment of rates other than the federal filed rate. *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Miss. Power*, 487 U.S. at 373.

benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Here, the General Assembly has applied its statutory scheme to discriminate against interstate commerce by seeking to coerce Plaintiffs to provide more favorable rates to in-state than out-of-state retail utilities. Such preferential treatment contravenes *New England Power Co.*, which held that a New Hampshire statute requiring a hydroelectric generating company to sell its power in state "at special rates adjusted to reflect the entire savings" attributable to its low costs violated the Commerce Clause because it was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states." *Id.* at 336, 339; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 580. Accordingly, the preferential-rate scheme is unconstitutional even if not otherwise preempted by the FPA.

CONCLUSION

The Court should declare Acts 74, 160, and 189 invalid, permanently enjoin the application or enforcement of those statutes so as to deny a CPG to VY based on nuclear safety concerns, permanently enjoin Defendants from taking any other action to force the shutdown of VY for nuclear safety reasons, and declare invalid and permanently enjoin Defendants from coercing VY to give Vermont retail utilities preferential rates.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, hereby certify that on September 4, 2011, I electronically filed the foregoing Pre-Trial Brief with the Clerk of the Court of the United States District Court for the District of Vermont by using the CM/ECF system and that they are available for viewing and downloading from the ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing to the following counsel for Defendants:

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